

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

DEMZA MASONRY, LLC

and

**Cases 22-CA-208778
22-CA-220318**

**LOCAL 4, BRICKLAYERS AND
ALLIED CRAFTWORKERS'
ADMINISTRATIVE DISTRICT
COUNCIL OF NEW JERSEY**

**COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE¹

On September 27, 2018, the Regional Director for Region 22, acting for and on behalf of the General Counsel for the National Labor Relations Board, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (“Consolidated Complaint”) alleging that Demza Masonry LLC (“Respondent”) engaged in unfair labor practices affecting commerce within the meaning of Section (a)(1) and (3) of the Act. [GC 1(p)].² In its Answer to the Consolidated Complaint, Respondent generally denied the unfair labor practices set forth in the Consolidated Complaint. [GC 1(r)]. Pursuant to the Notice of Hearing, a hearing in the instant case was held before Chief Administrative Law Judge Robert A. Giannasi on November 27 and 28, 2018, in Newark, New Jersey.

II. ISSUES

1. Did Respondent discharge Jeffrey Dunleavy, in violation of Section 8(a)(1) and (3) of the Act?
2. Did Respondent discharge Jose Hernandez, Marcelo Ligero and John Smith, in violation of Section 8(a)(1) and (3) of the Act?

¹ As used herein, “GC” refers to the General Counsel’s exhibits and “Tr.” refers to the pages of the official transcript.

² The charge in Case 22-CA-208778 alleges that Jeffrey Dunleavy was unlawfully discharged by Respondent on October 27, 2017. [GC 1(a)]. This allegation concerning Dunleavy’s unlawful discharge was pled in the initial Complaint in Case 22-CA-208778, which issued on January 30, 2018, well within the Section 10(b) period. As noted during the hearing, the Consolidated Complaint which subsequently issued on September 27, 2018, unintentionally omitted reference to the filing and service of a second amended charge in Case 22-CA-208778 [GC 1(h) and (i)]. The second amended charge inadvertently omitted the allegation regarding Dunleavy’s discharge. However, as discussed at the instant hearing, this omission from the second amended charge does not impact the allegation of Dunleavy’s discharge or Respondent’s notice of that allegation, as this allegation was included in the original Complaint served on Respondent and its counsel on January 30, 2018, within the Section 10(b) period. Moreover, the allegation concerning Dunleavy’s unlawful discharge was never withdrawn from the January 30, 2018 Complaint and has at all times been pled in the Complaint and the Consolidated Complaint. [GC 1(e), Tr. 9-10]. The Board has held that a respondent has actual notice of the charge allegations against it where, as here, service of the complaint pleading those charge allegations is made on the respondent within the statutory 6-month Section 10(b) period. See *Buckeye Plastic Molding*, 299 NLRB 1053 (1990) (Board held that even where a charge was not timely served on the respondent, the service on the respondent of a complaint containing those charge allegations made within the 10(b) period satisfied the notice requirements of the Act). Here, Respondent has actual notice of the Dunleavy discharge allegation as Respondent was timely served with the initial charge containing that allegation and timely served with the January 30, 2018 Complaint pleading that allegation. *Buckeye Plastic Molding*, *supra*.

III. STATEMENT OF THE FACTS

Background

Respondent is a non-union contractor in the commercial construction industry performing brick, block and masonry work. Its owner is Willie Dempsey and its Vice President is Joe Speranza. Richard Piez is one of the foremen and an admitted statutory supervisor and agent of Respondent. Piez's responsibilities include running Respondent's jobs at various sites, determining the size of his work crew, hiring bricklayers/masons and laborers, managing their work performance, and ordering materials for his jobs. Piez has the authority to hire and fire employees. (GC 1(p), Tr. 15-24) From September to November 2017, Piez was the foreman for the Annin Loft project located off Bloomfield Avenue in Verona, New Jersey. Thereafter, in March 2018, he became a foreman on a job located in Jersey City, New Jersey, where he remained a foreman as of the date of this hearing. (Tr. 36)

Jeffrey Dunleavy

Jeffrey Dunleavy has been working as a bricklayer since 1977 and a member of Local 4, Bricklayers and Allied Craftworkers' Administrative District Council of New Jersey ("the Union") since 1979. He began working for Respondent at its Verona jobsite on October 16, 2017 under foreman Piez. (Tr. 98-99) On October 25, 2017, during break time, Dunleavy gave Piez a "coming out" letter, informing Respondent that Dunleavy was a Union member and that he would organize Respondent's employees on his own time. Piez read the letter and expressed surprise that Dunleavy was a Union member. Piez then questioned Dunleavy about his prior employers and Dunleavy responded that he had worked for quite a few companies. (GC 3, Tr. 99-101) Dunleavy video recorded his conversation with Piez. (GC 5) Although Piez denied at the hearing having any recollection of receiving letters from Dunleavy, the video recording

showing that Piez was handed and was then reading Dunleavy's "coming out" letter leaves no room for such denial and renders Piez' testimony unreliable. (GC 5, Tr. 101-105)

The undisputed evidence shows that on Friday, October 27, 2017, two days after giving Piez the coming out letter, Dunleavy reported to work at 6:15 a.m.³ and began passing out Union literature to his coworkers who were sitting in their cars parked by the job site on Bloomfield Avenue. His coworker, Maurice Bell, who began working on that job before Dunleavy did and knew more employees, pointed out to Dunleavy who the Demza bricklayers and laborers were. When Dunleavy reached the end of Bloomfield Avenue, he ran into Piez. Dunleavy attempted to hand literature to him, but Piez refused to accept it and said that he did not want Union literature on the job. Piez further said that he was a Union member for 30 years, and questioned Dunleavy if he knew for whom he was working, reminding him that Speranza was one of the biggest Union contractors⁴. (TR. 105-106, 122-123) Dunleavy then put the remaining Union literature in his truck, took out his tools and walked into the jobsite with Bell. After Piez directed other employees to different areas to work, he told Dunleavy they needed to talk alone. Though Dunleavy had only distributed the Union literature prior to the start of his work time and off the job site, Piez told Dunleavy that he could not pass out Union literature "on the job". Dunleavy responded that he had not done anything wrong. Piez again reprimanded Dunleavy for passing out Union literature and told him that he had to leave the job because he could no longer work there. (Tr. 109-110, 117-119, 123-124)

Piez denied firing Dunleavy, and although in one breath he testified that Dunleavy was a "terrible" and "slow" worker and would not ever be recalled to work⁵, in the next breath, Piez claimed to have laid Dunleavy off because there was a lack of work. Piez then claimed to have

³ The scheduled start time was 7:00 a.m. (Tr. 106)

⁴ As noted, Speranza is now the VP of Respondent, a non-union contractor. (Tr. 17)

⁵ Dunleavy credibly testified that Piez had never complained about his work performance. (Tr. 110)

laid off three or four other bricklayers on or about that day, and that he was certain he had called his superiors about laying off three or four employees that day for lack of work⁶. (Tr. 146-153) However, Respondent's Verona time sheets show that Dunleavy was the only bricklayer terminated on October 27, 2017, and other than bricklayer Kiscel, who worked only on Monday, October 23, 2017, the remaining seven bricklayers worked four to five 8-hour days that week. Respondent's time sheets further establish that there was so much work that four bricklayers worked on Saturday, October 28, 2017 (Hart, Rubi, McLeod and Vricella), and Respondent added three new bricklayers (Vricella⁷, Rodriguez and Duplessi) to the Verona job that following week. Again, four of the bricklayers worked on that following Saturday, November 4, 2017 (Hart, Jeffer, Rodriguez and Duplessi). (GC 7, Tr. 162-165) The chart below, based on Respondent's Verona time sheets, sets forth the bricklayers who worked during the week that Dunleavy was discharged and the week after that, and the number of hours they worked. (GC 7)

	W/E 10/28/17							W/E 11/4/17					
BRICKLAYERS	M	T	W	TH	F	S		M	T	W	TH	F	S
R. Piez	8	8	10.5	8.5	8				8	8	8	8	
B. Hart	8		9	8	8	8			8	8	8	8	8
R. Jeffer	8		8	8	8				8	8	8	8	8
W. Williams	8		9	8	8				8	8		8	
M. Bell	8		8	8	8				8	8	8	8	
M. Rubi	8	5.5	8	8	8	8			8	8.5	8	8	
J. Dunleavy	8		8	8									
J. Kiscel	8												
A. McLeod		5.5	9	8	8	8							
M. Vricella						8			8	8	8	8	
T. Rodriguez									8	8	8	8	8
E. Duplessi											8	8	8

⁶ Respondent did not call Piez's superiors to testify to corroborate his claims although Piez testified that he spoke with his superior on a daily basis regarding the employees' work performance. (Tr. 17-20)

⁷ Vricella first appears on Respondent's payroll on Saturday, October 28, 2017, and then on Tuesday through Friday of the following week.

John Smith, Jose Hernandez & Marcelo Ligerio

In about March 2018, Piez was assigned as foreman to a job in Jersey City, New Jersey, where Respondent was a subcontractor hired to lay blocks and bricks for a 47-story high-rise residential building. (Tr. 36-37)

John Smith, Jose Hernandez and Marcelo Ligerio were Union bricklayers who started working for Respondent at the Jersey City jobsite in March 2018⁸. Their years of masonry experience ranged from 17 to 20 years (Tr. 40-41, 60-61, 80-81) The three bricklayers worked without incident for almost two months until they engaged in protected and union activities. In that regard, the unrefuted evidence shows that on about May 2, 2018, the Union picketed against Respondent at the Jersey City site from 7:00 am to 3:30 pm. On that day, the three bricklayers individually gave letters to Foreman Piez, notifying him that they were Union members and that they were seeking better pay and benefits. When Piez questioned Hernandez about the letter, Hernandez responded that it was from the Union. With Ligerio, Piez appeared angry and questioned Ligerio as to why he was not working for the Union. Finally, with Smith, Piez asked: “You’re a rat too?” (Tr. 41-45, 62-64, 75-76, 81-84) Piez did not deny the credible testimonies of Hernandez, Ligerio and Smith regarding the May 2, 2018 incidents but claimed that he had not opened the envelopes that contained these letters. (Tr. 143-144) However, based on Piez’s responses to the three bricklayers’ Union letters, it is clear that he knew what these letters were about.

⁸ The start dates for Hernandez, Ligerio and Smith are March 9, March 12 and early March 2018, respectively. (Tr. 41, 61, 80)

The next day, May 3, 2018, the Union again set up a picket line against Respondent at the Jersey City location. This time all three bricklayers joined the picket line from 7:00 am to 3:30 pm, along with Respondent's bricklayers Marvin and Luis, holding signs naming Respondent as failing to pay fair wages and benefits. Miguel Rubi, a Union member who has worked for Respondent for a long time, did not join the picket line and reported to work on that day. Piez was admittedly at the job site on May 3 and aware of the picketing activities at the job site. The undisputed evidence also shows that he and Respondent's owner, Dempsey, were watching the picket line during the day, and several times Piez was shaking his head as he watched. (Tr. 46-47, 64-67, 84-88, 171)

Not surprisingly, Hernandez, Ligero and Smith were terminated when they reported to work the next day, May 4, 2018. Marvin and Luis, the other two Demza bricklayers who also picketed on May 3, and two unidentified bricklayers from New York were terminated as well. Piez and Dempsey told them that they were being laid off because there was not enough material. (Tr. 47-48, 56, 67-68, 74-75, 88-89)

At the hearing, however, Piez testified that it has never happened where there was not enough material at a job. Rather, he claimed that by May 3, they had completed the ninth floor of the high rise, and there was only half the block work for the tenth floor to the 48th floor, so he had to reduce his crew by half⁹. Piez testified, "When you have a crew – say you have a crew of 25 guys. Work is getting tight. You can only -- ...keep 13..." (Tr. 143, 147, 173-175) In that

⁹ At the hearing, Piez did not explain the reason why he chose to terminate the bricklayers on a Thursday morning, before the work day began and at a time when block work was completed well beyond the ninth floor; Ligero was working on the tenth or eleventh floor, Smith on the 13th or 14th floor and Hernandez on the 15th or 16th floor. (Tr. 48-49, 68, 89-90)

regard, Respondent's time sheets show that in addition to the termination of Hernandez, Ligerio and Smith, two other bricklayers did not return to work after Wednesday, May 3 (Mendoza and Monge)¹⁰, and the total of bricklayers left on the job at that point was only 11¹¹. However, the time sheets also show that a new bricklayer, Arnes, began working at the Jersey City job the very next day, Thursday, May 4, and continued to work thereafter. Further, six new bricklayers, in addition to Arnes, began working the following week (Kehoe, F. Hernandez, Sosa, Fitzpatrick, McNamara and Martinez), bringing the total number of bricklayers working during the week ending May 13 to 18. While Kehoe and Martinez left the week after, another seven new bricklayers were added to the job (Degen, Rugda, Estrada, Lopez, Chamba, Agreda and Hegarty); the total number of bricklayers working during the week ending May 20 was 22. By the weeks ending May 27 and June 3, Respondent employed 27 bricklayers each week at the Jersey City jobsite. The tables below were prepared from the information contained in Respondent's time sheets for the Jersey City job from the week (the bricklayers on the job and the number of hours worked) that Hernandez, Ligerio and Smith were fired and the four weeks thereafter. (GC 8) Again, Respondent's own records prove Piez's statement that there was not enough work to be a blatant lie.

¹⁰ It is unclear as to whether Mendoza and Monge are Luis and Marvin or the two New York bricklayers.

¹¹ The Jersey City time sheets show that bricklayer Rodriguez did not work on Thursday and Friday, May 3 and 4, but did return to work that following Tuesday and continued to work thereafter. Bricklayer Castillo also did not work on Thursday, May 3, but returned to work on Friday, May 4, and continued to work thereafter. (GC 8)

W/E 5/6/18

W/E 5/13/18

W/E 5/20/18

BRICKLAYERS	M	T	W	Th	F	M	T	W	Th	F	S	M	T	W	Th	F	S
R. Piez	8	8	8	8	8	8.5	8	9	8.5	8		8	8	8	8	8	8
M. Rubi	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8
L. Rodriguez	8	8	8				8	8	8	5	8	8	8	8	8		
J. Hernandez	8	8	8														
J. Cerabin	8	8	8	8	8	8	8	8	8	8		8	8	8	8	8	8
M. Ligerio	8	8	8														
J. Smith	8	8	8														
J. Timeteo	8	8	8	8	8	8	8	8	8	8		8	8	8	8	8	
C. Mendoza	8	8	8														
S. Aynaguano	8	8	8	8	8												
V. Zumba	8	8	8	8	7	8	8	8	8	8			8	8	8	8	8
M. Viznay	8	8	8	8	8	8	8	8	8	8		8	8	8	8	8	
J. Valenzuela	8	8	8	8	8	8	8	8	8	8							
W. Thompson	8	8															
L. Santiago	8	8	8	8		8	8	8	8	8		8	8	8	8	8	8
James	8	8															
M. Monge		6	8														
D. Castillo		8	8		8	8	8	8	8	8		8	8	8	8	8	5
J. Arnes				8	8	8	8	8	8	8		8	8	8		8	
T. Kehoe						8	8	8	8	8							
F. Hernandez							8	8	8			8	8	8		8	
F. G. Sosa							8	8	8	8		8	8	8		8	
B. Fitzpatrick							8	8	8	8		8	8	8	8	8	
K. McNamara							8	8	8	8		8	8	8		8	
M. Martinez							8	8	8	8							
J. Degen												8	8	8	8	8	8
A. Rugda												8	8	8	8	8	
M. Estrada												8	8	8		8	
C. Lopez												8	8	8		8	
O. Chamba												8	8	8		8	
V. Agreda												8	8	8		8	
R. Hegarty													8	8	8	8	

W/E 5/27/18**W/E 6/3/18**

BRICKLAYERS	M	T	W	Th	F	S		M	T	W	Th	F	S
R. Piez	8	8	8	8	8			8		8	8	8	
M. Rubi	8	8		8	8	4							
L. Rodriguez	8	8	8	8	8				8	8	8	8	
J. Cerebio	8	8	8	8	8			8	8	8	4	8	
J. Timeteo	8	8	8	8	8					8	8	8	
V. Zumba	8		8						8	8	4	8	
M. Viznay	8	8	8	8	8				8	8	4	8	
L. Santiago	8	8	8	8	8				8	8	4	8	
D. Castillo		8	8	8	8				8	8	8	8	8
J. Arnes	8	8	8	8	8				8	8	8	8	
T. Kehoe	8	8	8	8	8				8	8	8	8	
F. Hernandez	8	8	8	8	8					8	5	8	
F. G. Sosa	8	8	8	8	8				8				
B. Fitzpatrick		8	8	8	8				8	8	4.5	8	
K. McNamara	8			8	8				8	8	4.5	8	
J. Degen	8	8	8	8	8	8			8	8	8	8	8
A. Rugda	8	8	8	8	8				8	8	8	8	
M. Estrada	8	8	8	8	8				8	8	8	8	
C. Lopez	8	8	8	8	8				8	8	8	8	
O. Chamba	8	8	8	8	8				8	8	8	8	
V. Agreda	8		8	8	8				8	8	8	8	
R. Hegarty	8	8	8	8	8				8	8	5	8	
Jose E. Rivera	8	8	8	8	8				8	8	8	8	
Raul Ubeda	8	8	8	8	8								
Incevcio Gervacio			8	8	8				8	8	5	8	
Rolando Feliciano			8	8	8				8	8	5	8	
Filemon Ramos					8								
Ra Felician									8	8	5	8	
F. Gomez										8	8	8	
J. McArfe										8	4.5	8	

Not only has Respondent shifted its reason for the layoff from the lack of material to not having enough work, which is unsupported by the record evidence, Respondent's claim that the three bricklayers were let go because of alleged "terrible" and "sloppy" performance is simply not credible. Piez testified that as a foreman, his practice was to first address the employees' performance issues and place them in appropriate positions because "there's a spot for everybody." However, the undisputed testimony shows that he never complained to Hernandez,

Ligero and Smith about their work and allowed them to work for almost two months before terminating them. (Tr. 25-26, 50, 59, 75, 90, 141-146) The one time that Ligero was questioned about an unlevelled wall was uneventful as owner Dempsey accepted his explanation that the mistake was actually made by bricklayer Julio and did not discipline or reprimand Ligero. Ligero thereafter continued to work without incident for another few weeks before he engaged in Union activities and was then discharged. More significantly, Julio was not laid off on May 3 and he continued to work. (Tr. 69-71) Further, Piez's vague accusation that Smith was always absent without permission and "couldn't make it there a full week in four weeks" is undermined by Smith's credible and undisputed testimony that he had no complaints about his attendance and that he always worked whenever weather permitted. Smith also credibly testified that while he had taken days off, it was always with advance notice to, and permission from, foreman Piez. The lack of evidence that Piez had reprimanded, or even spoken with Smith regarding his alleged unexcused absences while allowing him to work for two months also demonstrates that Piez's accusations were fabricated to cover up the fact that Smith was terminated because of his Union activities. (Tr. 90-92, 154-155) Moreover, as reflected in the following chart, the Jersey City timesheets show that no bricklayer consistently worked 40 hours per week during the two months that Smith worked for Respondent. The timesheets further show that there were many other bricklayers who worked well below 32 hours per week during that time period (GC 8)

Weeks ending

Bricklayers	3/17	3/25	4/1	4/8	4/13	4/22	4/29	5/6
R Piez	40	16	24	32	40	42	42.5	40
T Kehoe	40	37	03					
J Hernandez	32	37	32	32	32	40	32	Laid Off
J Cerebio	40	37	32	40	40	40		40
L Rodriguez	40	37	40	40	32	40	32	24
J Torres	24	37	32	40	32	40	24	
M Ligero	40	37	32	32	40	40	24	Laid Off
J Smith	24	37	32	48	32	29	16	Laid Off
M Bayton	40	29						
J Timeteo	32	32	32	40	32	40	40	40
M Rubi	37	37	40	40	16	8	40	49
A Cancela	40	37	16	32				
C Mendoza			24	40	16	8		16
S Aynaguano			24	40	40	40	24	40
V Zumba			24	40	40	40	24	39
M Viznay			24	40	40	40	24	40
J. Valenzuela					32	40	32	40
K. McInerey					8			
K. McNamara						24	32	
J. Morgan							2.5	
Lazaro Santiago							8	32
J. Piedra							5	
Wade Thompson							8	16
M. Monge							16	14
D. Castillo								24
Juanor Arnes								16

Respondent contends that the layoffs were not due to the employees' union activities because Piez was a Union member and that employees often wore union apparel at work without being harassed. It is undisputed and Piez conceded that unlike Hernandez, Ligero and Smith, those other union employees who wore union clothing had not participated in picketing against Respondent and had not distributed union literature. Case in point is Miguel Rubi, a Union member who did not otherwise engage in any union activities and was not terminated by Respondent. (Tr. 141, 149-154, 172) Further, Piez's resentment toward the Union was displayed when he testified that the Union had never referred him to work and that a couple of months

prior to the hearing, the Union took away his Union book and membership. Therefore, his claim that he held no Union animus is clearly disingenuous and false. (Tr. 141, 149)

IV. ARGUMENTS

A. Respondent Discharged Jeffrey Dunleavy, in violation of Section 8(a)(1) and (3) of the Act.

Under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes a showing of discriminatory motivation by proving the employee's pro-union activity, employer knowledge of the pro-union activity, and animus against the employee's protected conduct, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. See, e.g., *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

In this case, there is no doubt that Respondent knew about Dunleavy's Union and organizing activities and expressed hostility in response. In that regard, the undisputed evidence shows that after Dunleavy gave his "coming out" letter to Foreman Piez and handed out Union literature to his coworkers, Piez reprimanded Dunleavy for his Union activities, even though his activities were conducted before his scheduled start time and off the job site¹². When Dunleavy maintained that he had done nothing wrong, Piez discharged him on the spot and directed him to leave the job site. Thus, there could be no stronger evidence of animus against the Union as well

¹² While uncontradicted testimony need not be automatically accepted, the absence of any rebuttal to specific testimony is a significant factor to consider. "Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation." *Missouri Portland Cement Co. v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992). Moreover, the Board has further found that when a witness fails to deny or only generally denies without further specificity certain adverse testimony from an opposing witness an adverse inference is warranted. *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). It is therefore respectfully requested that an adverse inference be drawn where Respondent failed to deny testimonies provided by the General Counsel's witnesses.

as Dunleavy's Union activities than this retaliatory action taken by Piez. See *Bodega Latina Corporation*, 367 NLRB No. 34 (2018) (the Board adopted the ALJ's recommendation that the manager's email to the supervisor referencing an employee as being "pro-union" as part of his recommendation to deny the employee's time-off request is strong direct evidence of unlawful motivation, retaliation, and Respondent's union animus); *Southwire Co.*, 277 NLRB 377, 385 (1985) (the Board found direct evidence of animus where management's reference to Black, a pro-union employee, as the "source of evil" and a supervisor's comment to Black that he would be in trouble if he were seen talking with Black.) Piez's claim that he harbored no Union animus because he was a Union member and that Respondent's workers were not harassed for wearing union apparel on the job, is not credible and almost laughable. Piez could barely contain his resentment toward the Union at the hearing and clearly held a grudge against the Union for not referring him to work, taking away his Union book and terminating his Union membership. Thus, the evidence more than supports a finding that the General Counsel's initial burden has been met.

Respondent's defense that Dunleavy was laid off because of a lack of work, unrelated to his Union activities, is simply not believable. Piez's claim that three or four other bricklayers were also laid off is in stark contrast to the record evidence. Respondent's own time records show that Dunleavy was the only bricklayer terminated on October 27, 2017, and that immediately after his discharge, Respondent added many new bricklayers to the Verona job without recalling him. Thus, there is no merit to the lack of work defense. Respondent's pretextual defense that Dunleavy was terminated because of his work performance further demonstrates its unlawful motive. There is no testimonial or documentary evidence identifying his alleged performance issues other than Piez's accusations that Dunleavy was "terrible" and

“slow”. Regardless, Piez’s contrived excuse is merely a smoke screen since he conceded that Dunleavy was not fired, but laid off. Because the reasons advanced by Respondent for its discharge of Dunleavy are false and a pretext for its actual motive in taking that action, Respondent necessarily did not rely on those reasons in taking its action. Accordingly, there is no need to further address these reasons because a finding of pretext “leav[es] intact the inference of wrongful motive established by the General Counsel.” *Center Construction Company, Inc.*, 345 NLRB No. 45 (2005), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981). The truth of the matter is that after learning of Dunleavy’s organizing activities, Respondent wanted to do damage control and got rid of him quickly. The abruptness and suspicious timing of Dunleavy’s discharge, along with Respondent’s shifting and pretextual defenses, support the conclusion that Respondent unlawfully fired Dunleavy because of his Union activities. See *Relco Locomotives, Inc.*, 358 NLRB 298, slip op. at 14 (2012) (evidence of suspicious timing and false reasons given in defense all support inference of animus and discriminatory motivation.).

General Counsel submits that Respondent failed to adduce sufficiently probative or credible evidence to meet its substantial burden of rebutting the strong prima facie case. To the contrary, its fabricated defenses designed to conceal the true motive for Dunleavy’s discharge support a finding that Respondent discharged Dunleavy because of his Union activities, in violation of Section 8(a)(3) of the Act.

B. Respondent Discharged John Smith, Jose Hernandez and Marcelo Ligerio, in violation of Section 8(a)(1) and (3) of the Act.

The credible evidence in this case also establishes a strong prima facie case that Smith, Hernandez and Ligerio were unlawfully fired. It is undisputed that the three bricklayers worked for Respondent for almost two months without incident until they revealed their Union membership to foreman Piez and demanded better wages and benefits on May 2, 2018 and

picketed against Respondent on May 3, 2018. Respondent's antiunion animus is clear as Piez was undisputedly angry upon receiving the three bricklayers' Union letters and even called Smith a "rat." Further, the timing of their discharges on May 4, 2108 strongly supports a finding that the discharges were illegally motivated. See *American Wire Products*, 313 NLRB 989 (1994), where the Board held that timing is an important factor in assessing motivation in cases alleging discriminatory discipline on union or protected activities.

Respondent argues that Hernandez, Ligero and Smith would have been laid off regardless of their Union membership and activities because the amount of work at the Jersey City job site was reduced to half. This argument is clearly without support or merit and must fail. As in Dunleavy's case, Respondent's records show that it added new bricklayers to the job immediately after the three were terminated, and within two weeks, the number of bricklayers at the Jersey City job site more than doubled. This number continued to climb during the following weeks. Thus, the credible evidence shows that there was no reduction in work and that the layoff was not necessary. To the contrary, Respondent's workload increased tremendously and required the hiring of twice as many bricklayers.

Respondent also claims that Hernandez, Ligero and Smith were chosen to be terminated because they were "terrible" workers. As in Dunleavy's case, there is no testimonial or record evidence as to how the three bricklayers were "terrible" and Piez offered no explanation why he never complained to them about their work performance. Therefore, Piez's mere accusations were unsubstantiated and should not be given any weight. More significantly, since it is already established that the Jersey City layoff was not necessary and served merely as an excuse for Respondent to rid itself of the three active Union supporters, Respondent's accusations are pretextual and demonstrate an unlawful motive for the terminations of Hernandez, Ligero and

Smith. See *El Paso Electric Co.*, 355 NLRB 428, 428 fn. 3(2010) (finding of pretext raises an inference of discriminatory motive and negates rebuttal argument that employer would have taken the same action in the absence of protected activities); *All Pro Vending Inc.*, 350 NLRB 503, 508 (2007); *Rood Trucking Co.*, 342 NLRB 895, 897-898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F. 3d 224, 230 (D.C. Cir. 1995) (“When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual...the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal – an unlawful motive”); *Pro-Spec Painting*, 339 NLRB 946, 949 (2003) (noting that where an employer’s reasons are false, it can be inferred that the real motive is unlawful if the surrounding facts reinforce that inference.)

Further, Respondent’s contention that not all employees laid off were known Union members, i.e. Marvin, Luis and the two bricklayers from New York, is also nonmeritorious. The law is clear that the required unlawful motivation may be shown not only where the employer takes adverse action against individual employees in retaliation for their union activities, but also where the employer takes adverse action against a group of employees, regardless of their individual sentiments toward the union, to punish the employees as a group “to discourage union representation or in retaliation for the protected activity of some.” *ACTIV Industries, Inc.*, 277 NLRB 356, fn. 3 (1985). See also *Birch Run Welding*, 269 NLRB 756 (1984) (endorsing the theory “that Respondent engaged in a general retaliation against its employees because of the union activities of some of its employees in order to frustrate all union activities, even though some of those employees caught in the retaliatory net were not involved in union activities”) *enfd.* 761 F.2d1175 (6th Cir. 1985) It is noteworthy that while Marvin and Luis were not Union

members, they did join the picket line with Hernandez, Ligerio and Smith on May 2, 2018, and thus, were deemed by Respondent as trouble makers and had to be eliminated as well.

General Counsel submits that Respondent failed to adduce sufficiently probative or credible evidence to meet its substantial burden of rebutting the strong prima facie case that Respondent discharged Hernandez, Ligerio and Smith because of their Union activities, in violation of Section 8(a)(3) of the Act.

IV. CONCLUSION

The credible evidence in the record and the foregoing reasoning establishes that Respondent has violated Sections 8(a)(1) and (3) as alleged in the Complaint. General Counsel respectfully requests that a remedial order be issued requiring Respondent to:

- Cease and desist from engaging in the unlawful conduct alleged.
- Make whole Jeffrey Dunleavy, John Smith, Jose Hernandez and Marcelo Ligerio for any loss of earnings and other benefits and consequential damages resulting from their discharge.
- Offer reinstatement to terminated employees Dunleavy, Smith, Hernandez and Ligerio.

Dated at Newark, New Jersey
January 14, 2019

Respectfully Submitted,

/s/ *Sharon Chau*

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CERTIFICATION

This is to certify that copies of the foregoing Post-Hearing brief on Behalf of the General Counsel to the Administrative Law Judge have been duly served on the Administrative Law Judge, Respondent's counsel and Charging Party's counsel on January 14, 2019 as follows:

BY ELECTRONIC FILING

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